## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

By its decision dated October 22, 1943, this Court reversed the decision of the Circuit Court of Appeals for the Fifth Circuit, 134 Fed. (2d) 202, because that Court had not ruled upon the question of Florida law presented by prayer of the Complaint for a declaration as to the right of the City to call its bonds for redemption without providing for the payment of any portion of the deferred interest coupons. In its former opinion, this Court said that since the decision of the case

> "is concerned solely with the extent of the liability of the City on its refunding bonds"

it was the duty of a Federal Court in this action, where the jurisdiction of the Court had been properly invoked by the plaintiff,

> "to decide questions of state law whenever necessary to the rendition of a judgment".

It remanded the case to the Circuit Court of Appeals

> "for further proceedings in conformity with this opinion".

But the opinion of the Circuit Court of Appeals is not in conformity with the duty imposed upon it, since it does not declare the law of Florida. In fact, the Circuit Court of Appeals said that

> "aside from the *Andrews* case, we find no settled constitutional law established in Florida".

As to the *Andrews* case, 148 Fla. 144, 3 So. (2d) 805, it said that it was

> "not sure that the *Andrews* case requires us to hold otherwise"

even though it admitted that the decision of the Florida Supreme Court

> "must be taken as deliberate".

Again, it said

> "We are not satisfied that the *Andrews* case controls this one. But if it does, it does not cover the second question" etc. (the alternative prayer of the Complaint).

The statement of the Court, that it could

> "find no settled constitutional law established in Florida"

aside from the *Andrews* case, was due to the fact that it attempted to distinguish decisions of the Supreme Court of Florida from the case in hand. *Outman* vs. *Cone*, 141 Fla. 196, 192 So. 611, was held not to be controlling for the reasons given in the opinion, but the Court overlooked the determining factor in that case, which was that the Florida Court said that the provisions for the payment of the deferred interest coupon in the event of call were illegal, because they left

> "ground to jockey the bond situation",

and because the amount of the deferred interest would have to be

> "posted in favor of the holder of the old bonds"

if they had been called in the manner provided. If the bonds of Winter Haven had been called during the first three years, the portion of the deferred interest which the City under the call provision would have been required to post would, when added to the interest paid, have exceeded the rate of interest that would have accrued on the original bonds. The effect of this was to jockey the bond situation, which would have compelled it to post the premium in favor of the bondholders at the time of call.

We are unable to agree with the Court's summary of *Taylor* vs. *Williams*, 142 Fla. 402, 195 So. 175, that the

provision touching the new security was enjoined because it was held severable. The Order of the Court in that case was that the Bill of Complaint should not have been dismissed. There was no injunction issued. In its opinion, 142 Fla. 402, 195 So. 175, the Court said

> "The provision for deferred interest coupons is not authorized by law and should be eliminated".

On rehearing, the Florida Court wrote a second opinion, in which it said that in its former opinion it had held

> "that the 1935 refunding contract, resolution and bonds, and the 1939 refunding contract and resolution contained illegal provisions that should be eliminated, viz: provision as to deferred interest coupons on refunding bonds".

It concluded that

> "The refunding resolutions and contracts are not in accord with law and the Bill of Complaint should not have been dismissed".

The Circuit Court of Appeals, in its Order on the Petition for Rehearing, also sought to distinguish the case of *State* vs. *Special Tax School Dist. No. 3*, 143 Fla. 557, 197 So. 127, on the ground that the Florida Court had held the deferred interest coupon "originally and totally void", and that no part of the deferred interest was payable on the call as provided in the bonds of Winter Haven. Apparently, the Court did not realize that under the terms of those bonds, the District was required to pay the entire amount of the deferred interest coupon in the event the bonds were called for refunding.

The statement in the opinion of the Circuit Court of Appeals, that in *State* vs. *City of New Smyrna Beach*, 148 Fla. 482, 4 So. (2d) 660,

> "It seems that the decree validating bonds which carry deferred interest coupons was affirmed"

shows a misunderstanding of that case. The validating decree which was affirmed, was the decree validating the *new bonds* which were being issued. The new bonds did not carry deferred interest coupons. The deferred interest coupons which were involved were attached to the bonds which were being called for payment.

We attach to this brief in Appendix A statements quoted from the brief of the State of Florida, and in Appendix B, statements from the brief of the City, which briefs were filed in the above case, and call attention to the summary of the provisions of the bonds for call, and to the citation of *State* vs. *Sarasota*, 118 Fla. 629, 159 So. 797.

It is difficult to understand how the Court of Appeals could have held that the decision of the Florida Court in the *Andrews* case

> "must be taken as deliberate"

and at the same time say that it was not sure that it was controlling. The Florida Court expressly said

> "In answer to question 1, on authority of *Outman* vs. *Cone*, 141 Fla. 196, 192 So. 611, and *Taylor* vs. *Williams*, 142 Fla. 402, 195 So. 175 and 184, we are impelled to hold the deferred interest coupons void and non-enforcible, but that they may be severed from other provisions of the refunding bonds which may then be called under the terms of the contract".

Since this was the first question raised on appeal, and the Court's statement was a decision of that question, it was the decision of the Florida Court on the question of law presented, and should control the decision of the Federal Court in this case.

In substance, the decision of the Court of Appeals rests upon its own idea of what is just and equitable. The Court was in error when it stated that it only knew of the refund-

ing agency contract through the *Andrews* case. That contract is a part of Exhibit E, which is attached to the Plaintiffs' own Amended Bill of Complaint. While it is a separate document, the Resolution recites the making of the contract, and by Sec. 17, orders the bonds when issued to be placed in escrow and delivered

"pursuant to and as contemplated by the contract".

The Fifth Circuit Court of Appeals has itself held such a contract contrary to the public policy of the State of Florida. *Bradford County* vs. *Nuveen*, 133 Fed. (2d) 169, and denied recovery on it.

Even if, as the Court says, the invalidity of the contract ought not to affect the bonds, Sec. 20 of the Resolution should not be held to create a separate equitable right merely because provision for call on the bonds is unenforcible. The holding, that the contract should be kept separate from the Resolution, is directly contrary to the decisions of this Court in *McMullen* vs. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117, and *Hall* vs. *Coppell*, 7 Wall. 542. To give to Plaintiffs an equitable cause of action upon a resolution intended to make effective a contract which is contrary to the public policy of the State, because the provisions of the bonds are unenforcible, violates the principles of equity and justice, since it permits Plaintiffs to indirectly recover the money which they cannot recover at law, notwithstanding their participation in a violation of the public policy of the state.

Respectfully submitted,

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GILES J. PATTERSON,

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HARRY E. KING,

*Counsel for Petitioners.*